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Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled

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> *"Movement, we are told, is a law of animal life. As to man, in any event, nothing could be more essential to personality, social existence, economic opportunity—in short, to individual well-being and integration into the life of the community—than the physical capacity, the public approval, and the legal right to to be abroad in the land."* [1]

The past decade has witnessed a growing public awareness of the rights of many disadvantaged and previously ignored groups in society. Essentially unnoticed, however, are the problems of the physically disabled.[2] Discrimination against the handicapped exists in many forms. For instance, entire school systems flagrantly violate state law by excluding handicapped children;[3] planners design public buildings which are inaccessible to the physically disabled;[4] and employers, fearful of higher insurance costs, refuse to hire them.[5] While the ensuing economic costs are serious, the human costs, in terms of the suffering and wasted lives, are even more distressing.

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[1] Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CALIF. L. REV. 841 (1966) (Professor tenBroek himself was blind).

[2] The total number of physically handicapped individuals in the United States is not readily ascertainable. One authority recently placed the number at 11.7 million. *See Hearings on H.R. 8395 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 265 (1972) [hereinafter cited as *Handicapped Hearings—Senate*]. The difficulty in obtaining accurate and meaningful statistics is attributable to the inability of statisticians to measure the effect of a defined handicap on the capacity of the handicapped to function normally in society. For example, the epileptic may not be handicapped in his capacity to use public transportation; however, he is severely limited in his ability to secure and maintain employment. *See* M. Gandy, Notes on Employment Problems and Epilepsy Patients, Jan. 4, 1971 (available from Epilepsy Foundation of America). Similarly, an individual with a spinal cord injury may be able to obtain employment but incapable of utilizing public transportation in order to seek and maintain employment. *See Handicapped Hearings—Senate* 1006. Numerical statistics must be evaluated in terms of the resultant effect of a specific disability on participation in normal activity. *See generally* U.S. SOCIAL SECURITY ADMIN., DEP'T OF HEALTH, EDUC., & WELFARE, SOCIAL SECURITY SURVEY OF THE DISABLED: 1966 (Rpt. No. 10, 1970); U.S. DEP'T OF HEALTH, EDUC., & WELFARE, CHRONIC CONDITIONS AND LIMITATIONS OF ACTIVITY AND MOBILITY (National Health Survey Series 10, No. 61, 1971); U.S. HEALTH SERVICES & MENTAL HEALTH ADMIN., DEP'T OF HEALTH, EDUC., & WELFARE, USE OF SPECIAL AIDS, (National Health Survey Series 10, No. 78, Public Health Service Pub. No. (HSM) 73-1504).

[3] *See* 118 CONG. REC. 1258 (1972) (remarks of Representative Vanik).

[4] *See* Washington Post, Dec. 8, 1972, § D, at 3, col. 1.

[5] *See* M. Gandy, *supra* note 2, at 8.

While a number of laws have been enacted which affect the handicapped[6] it is only recently that the handicapped themselves vocally have asserted their right to equal treatment.[7] Proposed amendments to Title VI[8] and Title VII[9] of the Civil Rights Act of 1964 would have prohibited discrimination against the handicapped in federal programs and in private employment. Although there was strong support for these bills among the handicapped, no action was taken. A similar provision to prohibit discrimination in federal programs was included in the Rehabilitation Act of 1972[10] which was passed by Congress but subsequently vetoed by the President.[11]

In view of this limited legislative action, the handicapped may be forced to resort to the courts in order to vindicate their rights. To do

[6] Most of these laws do not secure the civil rights of the handicapped, but rather provide services and assistance. 29 U.S.C. §§ 31-42b (1970) (vocational rehabilitation for persons injured in industry); Developmental Disabilities Services and Facilities Construction Amendments of 1970, 42 U.S.C. §§ 2661-66, 2670-77c (1970). *See generally* U.S. DEP'T OF HEALTH, EDUC. & WELFARE, SUMMARY OF SELECTED LEGISLATION RELATING TO THE HANDICAPPED (1971). However, three recently enacted federal laws protect some aspects of a handicapped person's civil rights. *See* 42 U.S.C. §§ 4151-56 (1970) (prohibits architectural barriers in newly constructed and renovated federal buildings); Act of Oct. 21, 1972, Pub. L. No. 92-515, 86 Stat. 970 (protects civil rights of the blind and the otherwise physically disabled in the District of Columbia; requires equal access to public places, public accommodations and conveyances; prohibits discrimination in employment; and guarantees equal access to housing); Education Amendments of 1972, Pub. L. No. 92-318, § 904, 86 Stat. 235 (prohibits discrimination against the blind in federally funded educational programs).

Several states have gone further than the federal government in securing the rights of the disabled. The Illinois constitution guarantees the physically and mentally handicapped the fullest possible participation in the social and economic life of the state. ILL. CONST. art. I, § 19. Other states have anti-discrimination laws protecting handicapped persons seeking employment in private industry. *See* IOWA CODE ANN. § 601A.7 (Supp. 1972); WIS. STAT. § 111.31 (1969). In addition, many state constitutions provide for education as a basic right. *See* F. WEINTRAUB, A. ABESON AND D. BRADDOCK, STATE LAWS ON EDUCATION OF HANDICAPPED CHILDREN; ISSUES AND RECOMMENDATIONS 11 (1971). *But see id.* at 11-12, 17 (some state constitutions permit omission from mandatory attendance laws of children with certain handicaps); notes 14-16 *infra* and accompanying text. A number of state statutes provide that publicly funded buildings must be accessible to handicapped persons, and some statutes include publicly used-privately owned buildings as well. *See* COMMITTEE ON BARRIER FREE DESIGN, THE PRESIDENT'S COMMITTEE ON EMPLOYMENT OF THE HANDICAPPED, A SURVEY OF STATE LEGISLATION TO REMOVE ARCHITECTURAL BARRIERS. *See also* note 59 *infra*.

[7] Thoben, *Disabled People March for Civil Rights*, U.S. DEP'T. OF HEALTH, EDUC. & WELFARE, REHABILITATION RECORD, Sep. & Oct., 1972, at 24.

[8] H.R. 12,154, 92d Cong., 1st Sess. (1971).

[9] H.R. 10,962, 92d Cong., 1st Sess. (1972).

[10] H.R. 8395, 92d Cong., 2d Sess. (1972).

[11] Weekly Compilation of Presidential Documents, Oct. 30, 1972. The same provision was contained in a revised version of the Act passed by the 93d Congress. S. 7, 93d Cong., 1st Sess. (1973). It again was vetoed by the President. Weekly Compilation of Presidential Documents, Apr. 2, 1973. An attempt to override this veto failed.

so, they must develop new legal strategies by using existing theories in previously unexplored ways. This Note will consider the development of such strategies in the areas of education, physical access and employment.

EDUCATION

Sixty percent of the estimated seven million handicapped children in the United States are denied the special educational assistance they need for full equality of opportunity.[12] One million are excluded entirely from public school systems.[13] The bases for this discrimination lie in constitutional provisions,[14] statutes[15] and court decisions[16] of the various states. Two recent district court opinions, however, recognized the right of the handicapped to participate equally in public education. A consent decree issued in *Pennsylvania Association For Retarded Children v. Pennsylvania*[17] required the state to provide free access to public education and training for all mentally retarded children.[18] The court in *Mills v. Board of Education*[19] stated that the education right extended to the physically handicapped as well as to the mentally retarded.[20] The *Mills* court held that the denial of a publicly supported education for the handicapped in the District of Columbia, where public education was available to all others, violated the due process clause of the fifth amendment.[21] The same rationale may be applicable to the states through the equal protection clause of the fourteenth amendment.[22]

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12 118 CONG. REC. S7852 (daily ed. May 16, 1972) (remarks of Senator Williams).

13 *Id.*

14 *See* DEL. CONST. art. 10, § 1; N.M. CONST. art. 12, § 5. Both the New Mexico and Delaware constitutions permit omission of the mentally and physically handicapped from the state's compulsory school attendance provisions.

15 *See* ALASKA STAT. § 14.30.010(b)(3) (1962); NEV. REV. STAT. § 392.050 (1971).

16 The Wisconsin Supreme Court held that a board of education may deprive a physically handicapped child of his right to a public school education. *See* State *ex rel.* Beattee v. Board of Educ., 169 Wis. 231, 234-35, 172 N.W. 153, 155 (1919). However, in 1967 the Wisconsin Attorney General, while reaffirming the right of local school authorities to exclude a student, stated that other means for a free, public education must be provided. *See* F. WEINTRAUB, A. ABESON AND D. BRADDOCK, *supra* note 6, at 12. Thousands of handicapped children still are excluded from Wisconsin public schools. *See* 118 CONG. REC. E561 (1972) (remarks of Representative Vanik).

17 334 F. Supp. 1257 (E.D. Pa. 1971).

18 *Id.* at 1259.

19 348 F. Supp. 866 (D.D.C. 1972).

20 *Id.* at 878.

21 *Id.* at 875.

22 The fifth amendment, which contains a due process clause, is applicable to the District of Columbia, while the fourteenth amendment, which contains both a due process clause and equal protection clause, applies only to the states. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954). Though both concepts stem from the American ideal

The Supreme Court has applied two tests for judging whether a state's justification defeats an equal protection challenge. Under the more lenient rational basis test, a state's classification is unconstitutional only if based on grounds totally irrelevant to the state's objective.[23] However, when fundamental interests[24] or suspect classifications[25] are involved, the Court scrutinizes discriminatory laws more carefully and requires the state to demonstrate an interest sufficiently compelling to overcome a presumption of invalidity.[26]

Discrimination against the handicapped may be a suspect classification. The courts have found suspect classifications when the particular group involved is saddled with such disabilities, subjected to a history of such purposeful discrimination, or relegated to a position of such political weakness as to require special protection.[27] The stigma of inferiority usually attached to such a classification has been the major determining factor in designating classifications as suspect.[28] Handicapped groups historically have been politically weak and fragmented,[29]

of fairness, they are not mutually exclusive. While the equal protection clause is a more explicit safeguard against prohibited unfairness than the due process clause, every interest found to be fundamental and protected under due process probably is fundamental under the equal protection clause as well. *See Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1130 (1969). Thus the *Mills* court's rationale based on the due process clause in the District of Columbia is sound precedent for application of the equal protection clause to the states.

[23] *See, e.g.,* Reed v. Reed, 404 U.S. 71, 75-76 (1971); Morey v. Doud, 354 U.S. 457, 463-64 (1957); Lindsey v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911); *see* notes 129-130 *infra* and accompanying text.

[24] Fundamental interests include travel, voting, criminal procedure, marriage and procreation. *See* Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (travel); Reynolds v. Sims, 377 U.S. 533, 561-62 (1964) (voting); Douglas v. California, 372 U.S. 353, 357 (1963) (criminal procedure); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (marriage and procreation).

[25] Suspect classifications are those classifications based on alienage, race and national ancestry. *See* Graham v. Richardson, 403 U.S. 365, 371 (1971) (alienage); Loving v. Virginia, 388 U.S. 1, 9 (1967) (race); Korematsu v. United States, 323 U.S. 214, 216 (1944) (national ancestry).

[26] *See, e.g.,* Dunn v. Blumstein, 405 U.S. 330, 339 (1972); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964). The presence of a fundamental interest or a suspect classification is sufficient to trigger the compelling state interest test. *See, e.g.,* Graham v. Richardson, 403 U.S. 365, 371-72 (1971); Shapiro v. Thompson, 394 U.S. 618, 638 (1969); Loving v. Virginia, 388 U.S. 1, 11 (1967); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

[27] *See* San Antonio Independent School Dist. v. Rodriguez, 41 U.S.L.W. 4407, 4415 (U.S. Mar. 21, 1973).

[28] *See, e.g.,* Loving v. Virginia, 388 U.S. 1, 7 (1967) (racial classification); Brown v. Board of Educ., 347 U.S. 483, 494 (1954) (racial classification); Korematsu v. United States, 323 U.S. 214, 239 (1944) (Murphy, J., dissenting) (national ancestry classification). *See generally* Comment, *The Evolution of Equal Protection—Education, Municipal Services and Wealth,* 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 103, 132-35 (1972).

[29] *See Handicapped Hearings—Senate* 564-67.

and handicapped persons have been stigmatized by society with a badge of inferiority.[30] The handicapped condition, often congenital and unalterable, has been analogized to racial classifications[31] which almost always compel the strict standard of review.[32] Classification of the handicapped, involving a politically weak group with a congenital or unalterable trait, similarly should undergo the strictest scrutiny by the courts.

The alternative method to invoke the application of the compelling state interest test is to recognize education as a fundamental interest.[33] The Supreme Court, however, in *San Antonio Independent School District v. Rodriguez*,[34] sustained Texas' use of the property tax as the means for financing public education, while holding that education is not a fundamental interest.[35] The Court, nevertheless, left open a door to a constitutional attack on unequal educational opportunity when this inequality consists of an absolute denial of education.[36] Such an absolute denial of education is what confronts many handicapped chil-

[30] Kriegel, *Uncle Tom and Tiny Tim: Some Reflections on the Cripple as Negro*, 38 AMERICAN SCHOLAR 412 (1969). *But see Developments in the Law*, *supra* note 22, at 1127 (stigma of inferiority does not attach to certain physical disabilities as it does to recognized suspect classifications).

[31] Kriegel, *supra* note 30, at 416.

[32] The Supreme Court struck down a racial classification involving segregation in the public schools. Brown v. Board of Educ., 347 U.S. 483 (1954). Per curiam decisions issued by the Court subsequent to *Brown* dealing with other public facilities such as parks, bathhouses and golf courses indicate that all racial classifications are viewed with strictest scrutiny. *See, e.g.*, New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958), *aff'g mem.* 252 F.2d 122 (5th Cir.); Mayor & City Council v. Dawson, 350 U.S. 877 (1955), *aff'g mem.* 220 F.2d 386 (4th Cir.); Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954), *vacating mem.* 202 F.2d 275 (6th Cir. 1953). Subsequent decisions have applied the same strict standard. *See, e.g.*, Swann v. Board of Educ., 402 U.S. 1 (1971); Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

[33] *See, e.g.*, Rodriguez v. San Antonio Independent School Dist., 337 F. Supp. 280, 283 (W.D. Tex. 1971), *rev'd*, 41 U.S.L.W. 4401 (U.S. Mar. 21, 1973); Van Dursatz v. Hatfield, 334 F. Supp. 870, 874-75 (D. Minn. 1971); Serrano v. Priest, 5 Cal. 3d 584, 604-10, 487 P.2d 1241, 1255-59, 96 Cal. Rptr. 601, 615-619 (1971).

[34] 41 U.S.L.W. 4401 (U.S. Mar. 21, 1973).

[35] *Id.* at 4417.

[36] Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic and minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

Id. at 4418.

dren.[37] Hence the holding of *Mills v. Board of Education*,[38] that the right to a free, publicly supported education extends to all handicapped children,[39] should not be placed in jeopardy by the *Rodriguez* decision. In situations where there is no absolute denial of education to the handicapped, but merely the allegation that the education provided by the state is inadequate, the *Rodriguez* decision will limit plaintiff's attempts to obtain the strict scrutiny of suspect classification analysis.

If successful in establishing the handicapped condition as a suspect classification, traditional arguments offered as justifications by the state probably would not pass the compelling interest test. While a state might argue that prohibitive costs compel such classification, the Supreme Court has stated previously that constitutional rights cannot be denied merely because their protection will necessitate the expenditure of public funds.[40] Similarly administrative inconvenience is not a compelling interest justifying the exclusion of the physically disabled.[41] School systems which discriminate against or totally exclude handicapped children then would have to provide the equal educational opportunities to which all children are entitled.[42]

PHYSICAL ACCESS

TRANSPORTATION

The two major barriers to complete utilization of transportation facilities by the physically handicapped are architectural design and legal recognition of the rights of the handicapped. Architectural impediments are particularly acute for individuals confined to wheelchairs who are often unable to enter buses, trains, planes, or transportation terminals.[43] Since these physical obstacles can be eliminated effectively by modern technology and proper planning,[44] the only remaining barrier to sufficient mobility is the lack of legal principles implementing the right to fully use such facilities.[45] Even where that right clearly is

[37] *See* notes 13-16 *supra* and accompanying text.

[38] 348 F. Supp. 866 (D.D.C. 1972); *see* notes 19-22 *supra* and accompanying text.

[39] 348 F. Supp. at 875.

[40] *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 376 (1971); Boddie v. Connecticut, 401 U.S. 371, 382 (1971); Goldberg v. Kelly, 397 U.S. 254, 265-66 (1970).

[41] *Cf.* Boddie v. Connecticut, 401 U.S. 371, 381 (1971); Goldberg v. Kelly, 397 U.S. 254, 265-66 (1970).

[42] *See* F. WEINTRAUB, A. ABESON AND D. BRADDOCK, *supra* note 6, at 40-46.

[43] *See* Mandella & Schweikert, *Mobility for Physically Impaired Persons*, 25 PARAPLEGIA NEWS, Nov. 1972, at 14.

[44] *Id.* at 15-16. For example, California's Bay Area Rapid Transit System was designed to be totally accessible to disabled persons. *Id.*

[45] Some attempts have been and are being made. The Civil Aeronautics Board has notified air carriers of its intention to exercise rule-making authority with regard to the transportation of physically disabled persons. *See* 36 Fed. Reg. 20,309 (1971). The

established by legislation,[46] some officials have failed to initiate effective action.[47] Thus, the courts again may be called upon to provide relief where legislation is either non-existent or not fully implemented by public officials.

The Supreme Court has developed the principle that the right to interstate travel and the right to use the instrumentalities of interstate commerce are fundamental under the Constitution.[48] In *Shapiro v. Thompson*,[49] the Court declared that statutes requiring residence as a prerequisite for the receipt of welfare benefits infringe upon the constitutional right to travel by inhibiting movement from one state to another.[50] The Court reasoned that residency requirements create two

move is in reaction to present dissatisfaction with a 1962 industry agreement. *See* CAB Agreement No. 16614 (Dec. 31, 1962). *See generally Medical Criteria for Passenger Flying*, ARCHIVES OF ENVIRONMENTAL HEALTH, Feb., 1961. The new rules have not been promulgated.

The Interstate Commerce Commission has not regulated the transportation of handicapped persons via rail or interstate bus. *See Handicapped Hearings—Senate* 515. However, the National Railroad Passenger Corporation (AMTRACK) has provided barrier-free construction in new equipment and facilities and renovation of old equipment and facilities where practical and feasible. National Railroad Passenger Corp. Executive Memorandum No. 72-4 (Mar. 15, 1972).

[46] *See* 42 U.S.C. § 4151 (1970) (requiring that buildings financed with federal funds be designed and constructed to be accessible to the physically handicapped). The statute was amended in 1970 to include the Washington, D.C., subway system, presently under construction. *See* Act of Mar. 5, 1970, Pub. L. No. 91-205, 84 Stat. 49 *amending* 42 U.S.C. § 4151 (1970).

[47] Washington, D.C., subway officials refused to approve installation of elevators in the local system, as mandated by Congress, until ordered by the court to do so. *See* Washington Urban League, Inc. v. Washington Metropolitan Area Transit Authority, Inc., Civil No. 776-72 (D.D.C., June 29, 1973). The suit focused on the need for further appropriating legislation rather than individual rights.

[48] *See* United States v. Guest, 383 U.S. 745, 757 (1966). The right was first articulated by Chief Justice Taney in the *Passenger Cases*, a series of cases concerning the right of the states to impose a tax on aliens. Passenger Cases, 48 U.S. (7 How.) 282, 463 (1849) (Taney, C.J., dissenting). Eighteen years later a majority of the Court adopted Taney's earlier views that the right to travel is an incident of national citizenship. Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 49 (1867).

[49] 394 U.S. 618 (1969).

[50] *Id.* at 629. Pennsylvania, Connecticut and the District of Columbia had statutory provisions denying welfare assistance to individuals who had not resided in the particular jurisdiction for at least one year. *Id.* at 622-27. *See also* Dunn v. Blumstein, 405 U.S. 330 (1972) (durational residency requirement as prerequisite for voting violative of fundamental right to travel calling for application of compelling state interest test).

Whereas both *Guest* and *Shapiro* only involved the right to travel interstate, lower courts have found a fundamental right to travel intrastate. *See* King v. New Rochelle Municipal Housing Authority, 442 F.2d 646, 648 (2d Cir.), *cert. denied*, 404 U.S. 863 (1971); Cole v. Housing Authority, 435 F.2d 807, 809 (1st Cir. 1970); Valenciano v. Bateman, 323 F. Supp. 600, 603 (D. Ariz. 1971). The Supreme Court has never addressed the question of purely intrastate travel. The majority in *Shapiro* did not ascribe the right to travel to any particular constitutional provision but rather to the general constitutional concepts of personal liberty. 394 U.S. at 629. In dissent, Chief Justice

classes of potential welfare recipients—those living within the state for the prescribed period and those living within the state for less than the prescribed period.[51] Applying the compelling state interest test, the Court concluded that a classification which infringes the fundamental right to travel violates the equal protection clause of the fourteenth amendment.[52]

Similarly, all travelers might be classified into two groups—the physically handicapped, who have restricted access to the instrumentalities of interstate travel, and the non-handicapped, who have complete access. Since these discriminatory restrictions constitute an infringement on the right to travel, transportation companies should be required to demonstrate that a compelling state interest justifies the exclusion of the handicapped. Of course, some governmental action must be shown as a prerequisite for application of either the due process or the equal protection clauses.[53] Publicly owned transportation companies, and even certain privately owned companies,[54] would satisfy the "state action" requirement.

Warren and Justice Black looked to the commerce clause for the origins of the right. *See id.* at 644, 648 (Warren, C.J., & Black, J., dissenting). Justice Harlan, in dissent, concluded that the right has its source in the due process clause of the fifth amendment. *Id.* at 655, 671 (Harlan, J., dissenting). The Court has also found a close relationship between the freedom to travel and the freedoms of speech and association. *See* Aptheker v. Secretary of State, 378 U.S. 500, 517 (1964). Under the view that the right to travel stems from the commerce clause, it probably would not apply to purely intrastate transportation. But, if the right derives from the freedoms of speech and association, it would be difficult to deny its application to intrastate travel. *See* Note, *Residence Requirements After Shapiro v. Thompson*, 70 COLUM. L. REV. 134, 138 (1970).

[51] 394 U.S. at 627.

[52] *Id.* at 638. The Court further held that the District of Columbia's residence requirements for welfare benefits violated the due process clause of the fifth amendment. *Id.* at 641-42. *See generally* 1 C. ANTIEAU, MODERN CONSTITUTIONAL LAW § 8.94 (1969). The equal protection clause does not apply to the District of Columbia. *See* note 22 *supra*.

[53] For a court to find that a transportation system is in violation of equal protection, state action must be shown. U.S. CONST. amend. XIV, § 1. Governmental action is also necessary for application of fifth amendment due process. *See* Public Utilities Comm'n. v. Pollack, 343 U.S. 451, 461 (1952); Corrigan v. Buckely, 271 U.S. 323, 330 (1926). The operation of a transportation company regulated under the authority of Congress constitutes governmental action. *See* Public Utilities Comm'n. v. Pollack, *supra* at 461-62.

[54] A privately owned municipal transit system can be so enfranchised that it is state action for the company to engage in conduct violative of equal protection. *See* Boman v. Birmingham Transit Co., 280 F.2d 531 (5th Cir. 1960); Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347, 358-59 (1963). The courts have found state action in various other instances. *See, e.g.*, Evans v. Newton, 382 U.S. 296 (1966) (private organization carrying out a public function); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (private business an integral part of a public building devoted to a public service); Shelley v. Kraemer, 334 U.S. 1 (1948) (judicial enforcement of a private agreement). *But see* Moose Lodge 107 v. Irvis, 407 U.S. 163 (1972) (mere licensing does not constitute state action).

The cost of solving current architectural problems through existing technology should not be a sufficiently compelling interest to justify the denial of a fundamental constitutional right such as travel.[55] Therefore, courts may be asked to require publicly owned and some privately owned transportation systems to spend the funds necessary to make their facilities accessible to the physically handicapped.

PUBLIC BUILDINGS

The handicapped presently are excluded from many public buildings by architectural barriers ranging from monumental staircases to six-inch curbs.[56] Although federal law requires that all new federal and federally assisted facilities designed for public use be readily accessible,[57] there is no provision for existing structures.[58] State statutes addressing the problem of architectural barriers also generally ignore the need for modifications of existing buildings.[59] These buildings house a wide range of federal and state agencies and services to which the public must have access; the efforts of the handicapped individual to secure assistance and present grievances and complaints are impeded by his inability to gain physical access to the buildings. If this interference infringes the handicapped person's constitutional rights, removal of the interference may be forced by court action.

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[55] *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 376 (1971); Boddie v. Connecticut, 401 U.S. 371, 382 (1971); Goldberg v. Kelly, 397 U.S. 254, 255-56 (1970).

[56] *See* Martin, *A Wheelchair View*, Washington Post, Dec. 8, 1972, § D, at 5, col. 1; Martin, *When 'Up' is a Down*, Washington Post, Oct. 29, 1972, § K, at 1, col. 1; Martin, *Handicaps on the Hill*, Washington Post, Oct. 1, 1972, § L, at 1, col. 8.

[57] *See* 42 U.S.C. §§ 4151-56 (1970). Primary responsibility for developing standards is lodged with the Administrator of General Services who must consult with the Secretary of Health, Education, and Welfare. *Id.* § 4152 (1970). Regulations passed pursuant to the legislation have incorporated detailed accessibility standards adopted by the American National Standards Institute. Federal Property Management Regulations, 41 C.F.R. § 101-17.704 (1972); *see* AMERICAN NATIONAL STANDARDS INSTITUTE, AMERICAN STANDARD SPECIFICATIONS FOR MAKING BUILDINGS AND FACILITIES ACCESSIBLE TO AND USABLE BY THE PHYSICALLY HANDICAPPED, USAS A117.1 (1961). The ANSI standards include ramp gradients, water fountain heights, and door and toilet stall widths. *Id.* § 5.

[58] Only existing structures which are altered for federal use or with federal funds are included in the legislation. *See* 42 U.S.C. § 4151 (1970).

[59] *See* COMMITTEE ON BARRIER FREE DESIGN, *supra* note 7. Some of the statutes provide that accessibility is required only if economically feasible and not unreasonably complicated. Others require that the building have one entrance which is accessible while ignoring other barriers. *See id.* Four states have laws covering publicly used, privately owned buildings; fourteen explicitly cover remodeling. *See id.* Like the federal government, most states have no provision for existing structures. One county in Ohio did consent to erect an elevator in the existing county courthouse after suit by a local resident. Consent Decree, Wargowsky v. Novak, Civil No. C-72-138 (N.D. Ohio, March 30, 1973). Another county in Ohio consented to remove barriers from its court houses and the health and welfare building. Friedman v. County of Cuyahoga, Case No. 895961 (Cuyahoga County Ct. 1972).

The Supreme Court long has recognized that citizens have the right to come to their "seats of government" [60] to transact business and petition for redress of grievances.[61] This freedom to petition is protected by the first amendment[62] and applies to all branches of government, including the administrative agencies.[63] The judiciary has been vigilant to prohibit infringement upon the citizen's right to communicate freely with the government. In *Brown v. Louisiana*[64] the Supreme Court upheld the right of the citizen to be physically present in a public building to petition for redress of a grievance related to the operation of

[60] The seat of government is where the courts, executive and legislature are located. *Cf.* Edwards v. South Carolina, 372 U.S. 229, 235 n.10 (1963).

[61] *See* Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 44 (1867); Passenger Cases, 48 U.S. (7 How.) 282, 491 (1849) (Taney, C.J., dissenting). Although courts recognize the extreme importance of the right to petition, it has received much less attention than the rights of speech and assembly. This may be due to the fact that it is closely intertwined with the latter rights. *See* United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967) (speech, assembly and petition intimately connected and equally fundamental). *See also* De Jonge v. Oregon, 299 U.S. 353, 364 (1937) (right to petition an integral part of republican form of government).

[62] U.S. CONST. amend. I. The first amendment's prohibition of acts by Congress abridging the right to petition has been extended to the states through the fourteenth amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Schneider v. State, 308 U.S. 147, 160 (1939); Gitlow v. New York, 268 U.S. 656 (1925). Section 1983 of title 42 of the *United States Code* prohibits state violations of rights protected by the fourteenth amendment and can serve as a basis for suit against the state. *See* Wilwording v. Swenson, 404 U.S. 249 (1971); Hatfield v. Bailleaux, 290 F.2d 632, 636 (9th Cir. 1961); 42 U.S.C. § 1983 (1970). *See also* Chambers v. Baltimore & O.R.R., 207 U.S. 142, 148 (1907) (right to sue and defend is privilege under article IV of the Constitution; right conservative of all other rights).

[63] *See* California Motor Trans. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972). Although access to the courts is protected by the first amendment, when the state denies a party use of the courts or refuses a remedy, due process may be violated. While a state may regulate the manner in which its courts operate, due process is denied if its conditions are unreasonable. *See* Cohen v. Beneficial Finance, 337 U.S. 541 (1949). *See also* Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (garnishment without opportunity to defend). Such due process requirements extend to administrative actions as well. *See* Bell v. Burson, 402 U.S. 535 (1971) (license revocation by Bureau of Motor Vehicles); Goldberg v. Kelly, 397 U.S. 254 (1970) (no evidentiary hearing prior to termination of welfare benefits).

In a recent case the appellants argued that the imposition of filing fees on indigents in divorce actions violated their first amendment right to petition. *See* Boddie v. Connecticut, 401 U.S. 371 (1971). The Court, however, viewed access to the courts as an element of due process in this instance because the judicial process was the only means available for dissolving the marriage. *Id.* at 375. Why the Court chose due process is not clear since issues such as service of process would not have been necessary to resolve had they relied on the first amendment. *See* La France, *Constitutional Law Reform for the Poor: Boddie v. Connecticut*, 1971 DUKE L.J. 487, 529 (the author was counsel for appellants).

[64] 383 U.S. 131 (1966).

that facility.[65] Moreover, in *Edwards v. South Carolina*[66] the Court viewed the defendants' efforts to enter the state house grounds, a public facility, to present their grievances as an exercise of first amendment rights in its most "pristine and classic form." [67] Thus, while public agencies have the right to regulate access to their facilities,[68] they may not do so in an unreasonable and discriminatory manner.[69] Since the physical barriers which impede the handicapped individual's access generally exist because of poor planning choices and serve no useful purpose, they may be attacked as unreasonable and discriminatory. The possibility of alternative means of communication is irrelevant. The defendants in *Brown* and *Edwards* had other means of communication, but the Court nevertheless found the restrictions on defendants' access to be an unjustifiable burden on their first amendment rights.[70]

Since the right to petition is protected by the first amendment it may only be infringed when a danger exists to interests which the state lawfully may protect.[71] The state clearly has infringed the rights of the handicapped since, although it did not create their physical condition, by constructing physical barriers it created their exclusion.[72] The state had the alternative when building its facilities to use designs which would have made them fully accessible at similar cost.[73] By an official

[65] *Id.* at 142.

[66] 372 U.S. 229 (1963).

[67] *Id.* at 235.

[68] *See* Brown v. Louisiana, 383 U.S. 131, 143 (1966).

[69] *Id.* Discriminatory regulations infringing first amendment rights are prohibited even for restricted areas such as military bases. *See* Flower v. United States, 407 U.S. 197 (1972) (leafletting permitted on "public street" within military base); *cf.* Downing v. Kunzig, 454 F.2d 1230 (6th Cir. 1972) (public normally has access when conducting own business). *But see* Barrett v. Kunzig, 331 F. Supp. 266 (1971), *aff'd*, 41 U.S.L.W. 3128 (6th Cir. Feb. 22, 1972), *cert. denied*, 409 U.S. 914 (1972).

[70] *See* Brown v. Louisiana, 383 U.S. 131 (1966) (statute infringed right to enter library to petition for end to segregated library system); Edwards v. South Carolina, 372 U.S. 229 (1963) (statute infringed right to enter state house grounds to express grievances). *But see* Adderly v. Florida, 385 U.S. 39 (1966) (state's interest in controlling jailyard property was sufficient to uphold convictions of demonstrators); Cox v. Louisiana, 379 U.S. 559 (1965) (activities near court house may be limited in deference to judicial integrity).

[71] *See* NAACP v. Button, 371 U.S. 415, 438 (1963) (only compelling state interest can justify limiting first amendment freedoms).

[72] Even if no first amendment right of access exists, the handicapped individual may be denied equal protection of the laws if the state creates an unreasonable classification between the disabled and the non-disabled without a rational relationship to some state interest. *See* note 23 *supra* and accompanying text.

[73] Cost estimates by the National League of Cities based on seven hypothetical buildings indicate that the additional cost involved in making them barrier free would be less than one-half of one percent. *See* NATIONAL COMMISSION ON ARCHITECTURAL BARRIERS, DESIGN FOR ALL AMERICANS 7 (1967). Studies based on three buildings actually constructed indicated that the cost was increased by only one-tenth of one percent. *See id.*

choice of construction[74] the state has infringed the rights of the handicapped without countervailing state interest. Therefore the state has a duty to eliminate all such impediments to the free exercise by the handicapped of their rights.[75] Some changes, such as ramps and railings, may be effected at minimal financial outlay;[76] others may involve expensive structural changes. The courts, however, will order costly protections when Bill of Rights freedoms are involved.[77] Thus, the handicapped individual may have a remedy against either the state or the federal government for violation of his first amendment rights.

EMPLOYMENT

PRIVATE EMPLOYMENT

Only a small percentage of the estimated 14 million physically handicapped Americans who could work if given the opportunity actually are employed.[78] The handicapped individual's unemployment

[74] *See* United States v. Raines, 362 U.S. 17, 25 (1960) (requirement of state action met when source is person or agency formally identifiable).

[75] *Cf.* Brown v. Board of Educ., 349 U.S. 294, 300 (1955) (remedies to constitutional infringement must be enforced). A court might find that the state's duty to provide access could be fulfilled by means other than barrier removal, such as providing agents to assist the handicapped individual in securing services he otherwise might be unable to obtain. While this may be an administratively logical solution, it does not seem to be fully within the meaning of the constitutional imperative that there be no infringement.

[76] NATIONAL COMMISSION ON ARCHITECTURAL BARRIERS, *supra* note 73, at 3.

[77] *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (abolished poll tax); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel at trial); Douglas v. California, 372 U.S. 353 (1963) (right to counsel on appeal). *See also* Note, *Discrimination Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435, 440-41 (1967) (financial interests of the state).

[78] 118 CONG. REC. 1472 (1972) (remarks of Senator Williams). One study showed that 25 percent of the unemployed handicapped respondents had tried but were unable to find jobs. *See* A.D. Little Co., Employment, Transportation and the Handicapped, July 1968, at 30 (U.S. Social and Rehabilitation Serv., Dept. of Health, Education, and Welfare, No. C-69492).

Among the more severely handicapped, however, fully a third of those surveyed were unable to obtain employment. *Id.* at 31. The rate of employment for the entire sample was 50 percent, varying from a high of 75 percent for individuals with back and spine problems to a low of 29 percent for amputees. *Id.* at 29-30.

In addition to private employment, sheltered workshops funded by the state vocational agencies provide training and work for some handicapped individuals. These workshops are partially exempt from the minimum wage requirements of the Fair Labor Standards Act. *See* 29 U.S.C. § 214(d) (1970). Encouraged as a necessary alternative for the disabled, the workshops are criticized for providing inadequate wages and facilities. *See Handicapped Hearings–Senate* 1046-47. *See also* H.R. REP. No. 92-1135, 92d Cong., 2d Sess. 43 (1972). Additional jobs are provided under the Randolph-Sheppard Act of 1936 which grants blind people licenses and initial financial aid for the operation of vending stands. 20 U.S.C. § 107 (1970); *see* H.R. REP. No. 92-1135, 92d Cong., 2d Sess. 49-55 (1972). These jobs may be limited by the increasing

naturally impairs his ability to support a family and to participate fully in the daily activities of society. Some, unable to rely on family support or other resources, are forced to accept welfare.[79]

Although transportation and physical barriers play significant roles in restricting employment possibilities,[80] a crucial factor is employer attitude. In addition to stereotyped prejudices,[81] many employers fear that the handicapped person will be unable to perform assigned tasks.[82] This attitude exists despite the results of numerous studies showing that the handicapped worker, when assigned an appropriate position, performs as well as, or better than, his non-handicapped co-workers.[83]

In spite of reassurances by insurance associations, many employers also fear that workmen's compensation rates will increase due to employment of the disabled.[84] However, employment of the handicapped does not affect the premium rates either for non-occupational benefit plans or for workmen's compensation.[85] Furthermore, 46 states have second-injury laws which afford the employer some protection against bearing the full cost of support if a disabled employee is reinjured and permanently disabled.[86] Nevertheless, employer prejudice against the handicapped as an insurance liability remains.

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use of automatic vending machines. *Id.* at 52. Encouragement to enterprises hiring the blind is also provided by the Wagner-O'Day Act which authorizes special purchases by federal agencies of blind-produced supplies. *See* 41 U.S.C. §§ 46-48 (Supp. 1971).

[79] It is estimated that rehabilitation by federally financed state vocational rehabilitation agencies of 51,084 handicapped persons saved over $40.5 million in public assistance payments. H.R. REP. No. 92-1135, 92d Cong., 2d Sess. 12 (1972).

[80] *See Handicapped Hearings—Senate* 515, 534-35; A.D. Little Co., *supra* note 78, at 30; notes 43-45 *supra* and accompanying text.

[81] One study showed that all disabled groups were subject to prejudice and that personnel directors would prefer to hire a former prison inmate or mental hospital patient than an epileptic. *See* Richard, Triandis & Patterson, *Indices of Employer Prejudice Toward Disabled Applicants*, 47 JOURNAL OF APPLIED PSYCHOLOGY 52 (1963). *See also* M. Gandy, *supra* note 2.

[82] *See* U.S. BUREAU OF LABOR STANDARDS, DEP'T OF LABOR, BULL. No. 234, WORKMEN'S COMPENSATION AND THE PHYSICALLY HANDICAPPED WORKER 5, 20 (1961).

[83] *See id.* at 6-8.

[84] The Association of Casualty and Surety Companies pointed out that rates are based solely on the relative hazards in the company's work and the company's accident experience. *Id.* at 45. Statistics show that a company actually might minimize their accident experience by hiring the disabled since they have eight percent fewer accidents than their co-workers. *See Handicapped Hearings—Senate* 539.

[85] U.S. BUREAU OF LABOR STANDARDS, *supra* note 82, at 10.

[86] *See Handicapped Hearings—Senate* 535. Although many of these laws are limited in the types of injuries covered and the amount of liability, some states are attempting to strengthen the laws. *Id.* at 536. *See also Hearings on H.R. 8395, H.R. 9847 and Related Bills Before the Select Subcomm. on Education of the House Comm. on Education and Labor*, 92d Cong., 2d Sess. 113 (1972) (hereinafter cited as *Handicapped Hearings—House*); U.S. EMPLOYMENT STANDARDS ADMINISTRATION, DEP'T OF LABOR, BULL. No. 212 (1971).

Present governmental efforts promote voluntary action by employers[87] and encourage placement activities[88] but do not aid persons refused employment because of handicaps.[89] Other groups, especially blacks, also face serious discrimination in hiring by private employers. Gradually barriers are being overcome and jobs are being opened to qualified persons without regard to race. Progress has been achieved by litigation based either on recent[90] or on Civil War era[91] legislation. There may be some hope for similar progress through the courts for the handicapped.

The primary federal law prohibiting discrimination by private employers, Title VII of the Civil Rights Act of 1964,[92] clearly does not proscribe discrimination against the handicapped.[93] However, a 1968 Supreme Court decision, *Jones v. Alfred H. Mayer Co.*,[94] involving racial discrimination, may provide a possible avenue of relief. The Court held that Section 1982 of title 42 of the *United States Code*,[95] a relatively obscure statute originally derived from the Civil Rights Act of 1866,[96] applies to private racial discrimination in the sale of housing.[97] In refuting the general belief that state action was required,[98] the Court

[87] The President's Committee on Employment of the Handicapped works with industry to gain acceptance of the handicapped worker and sponsors a National Employ the Handicapped Week to publicize its efforts. *See Handicapped Hearings—Senate* 540, 1036-37. Each state has a Governor's Council on Employment of the Handicapped which works closely with the President's Committee. In addition there are over 1,000 local committees. *Id.* at 539.

[88] In accordance with a 1971 Presidential directive, the vocational rehabilitation agencies, in conjunction with the United States Employment Service and the Veterans Administration, are placing special emphasis on training and job placement of Vietnam veterans. *See Handicapped Hearings—Senate* 254-56.

[89] Only a few states have laws which prohibit private employment discrimination. *See, e.g.*, ILL. ANN. STAT. ch. 38, § 13-2 (Smith-Hurd 1972); IOWA CODE ANN. § 601A.7 (Supp. 1972); WIS. STAT. ANN. § 111.31 (Supp. 1973).

[90] *See* Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e (1970).

[91] *See* Act of May 31, 1870, ch. 114, § 16, 42 U.S.C. § 1981 (1970); note 99 *infra*.

[92] 42 U.S.C. § 2000e (1970).

[93] Title VII makes it an unlawful employment practice to discriminate against any person because of race, color, religion, sex or national origin. *Id.* § 2000e-2(a) (1970). Efforts have been made to expand it to include the handicapped without success. *See* notes 8-10 *supra* and accompanying text. Even if efforts to include the handicapped in Title VII are successful, no Title VII remedy exists against employers of less than 25 workers. 42 U.S.C. § 2000e(b) (1970).

[94] 392 U.S. 409 (1968).

[95] 42 U.S.C. § 1982 (1970).

[96] Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27.

[97] 392 U.S. at 420.

[98] *See id.* at 409, 419-20, 436. Prior to *Jones* it generally had been assumed that section 1982 required state action. *See* Larson, *The Development of Section 1981 As a Remedy for Racial Discrimination*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 56, 57 (1972); 35 BROOK. L. REV. 275, 276-77 (1969). *But see* United States v. Morris, 125 F.2d 322 (E.D. Ark.

indicated that a companion statute, Section 1981,[99] is applicable to private discrimination in employment.[100]

The *Jones* Court examined the legislators' intent in enacting the 1866 Act and the thirteenth amendment, the latter stating that "[n]either slavery nor involuntary servitude . . . shall exist within the United States . . . ." [101] An enabling clause grants Congress the power to enforce the amendment by appropriate legislation.[102] The *Jones* Court considered the amendment to have both a negative aspect—the abolition of slavery—and an implicit positive corollary—the establishment of universal freedom.[103] While specifically declining to decide whether the amendment itself did any more than establish universal freedom,[104] the Court held that Congress, under the enabling clause, had the power to decide what acts constituted "badges and incidents of slavery" and

1903) (section one of Civil Rights Act of 1866, predecessor of section 1982, prohibits private acts of discrimination aimed at preventing blacks from buying land).

[99] The statute provides that "All persons . . . shall have the same right . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981 (1970).

Both sections 1981 and 1982 are derived from section one of the Civil Rights Act of 1866. 392 U.S. at 422 n.28. The current *United States Code* notes that Section 1982 is derived from the 1866 Act but attributes section 1981 only to the 1870 statute which reenacted the 1866 Act after the fourteenth amendment was passed. However, section 1981 retains the scope of the 1866 statute. *See* Note, *Racial Discrimination In Employment Under the Civil Rights Act of 1866*, 36 U. CHI. L. REV. 615, 619 (1969).

[100] The Court, in a lengthy footnote, specifically overruled an earlier decision which held that section 1981 required state action in employment discrimination. 392 U.S. at 441 n.78, *overruling* Hodges v. United States, 203 U.S. 1 (1906). A lower court was prompt in seizing upon the language in *Jones* to prohibit discrimination by private employers on racial grounds. *See* Dobbins v. Local 212, IBEW, 292 F. Supp. 413 (S.D. Ohio 1968). To date five circuits have agreed. *See* Bradley v. Bristol-Myers, Inc., 459 F.2d 621 (8th Cir. 1972) (racial discrimination in hiring practices); Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972) (racial discrimination in promotion policies); Young v. International Telephone & Telegraph Co., 438 F.2d 757 (3d Cir. 1971) (racial discrimination by both employer and union); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971) (refusal to rehire based on race); Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970) (racial discrimination in hiring practices).

One court has questioned whether section 1981 is in fact derived from the 1866 Act. *See* Cook v. Advertiser, 323 F. Supp. 1212 (M.D. Ala. 1971), *aff'd on other grounds*, 458 F.2d 1119 (5th Cir. 1972). The discrepancies on which the *Cook* court based its opinion may be due to the mistake of a codifier in compiling and revising the statutes. *See* Note, *Section 1981 and Private Discrimination*, 40 GEO. WASH. L. REV. 1024, 1036-39 (1972). *See generally* Larson, *supra* note 98, at 56.

[101] U.S. CONST. amend. XIII; *see* 392 U.S. at 422-44.

[102] *See* U.S. CONST. amend. XIII, § 2.

[103] 392 U.S. at 439; *see* Bailey v. Alabama, 219 U.S. 219, 241 (1911); Hodges v. United States, 203 U.S. 1, 17 (1906); Civil Rights Cases, 109 U.S. 3, 20 (1883).

[104] 392 U.S. at 439.

thus could be prohibited.[105] Although the Court indicated that *Jones* is applicable only to race,[106] some commentators suggest that the rationale of *Jones* applies to other forms of discrimination.[107] Thus, it is possible to construct an argument asserting that the thirteenth amendment and the subsequent Civil Rights Act of 1866 prohibit employment discrimination against the handicapped.

In passing the thirteenth amendment the primary consideration in the minds of the legislators was Negro slavery in the South.[108] However, in drafting the amendment the legislators recognized that it would make fundamental changes in the federal system and would enable Congress to establish laws insuring equality for all citizens.[109] By enacting section one of the 1866 Act, Congress extended to "citizens of every race and color" the same rights to purchase and contract as those enjoyed by "white persons."[110] Section 1981, derived from section one, is even broader—encompassing not only citizens but "all persons" within the United States.[111] The debates at the time of enactment indicate that the legislators did not intend to limit the protection of the Act to blacks.[112] Both sides in the controversy stated that the Act applied to all persons.[113] The legislators intended to prevent any group from being held in an inferior status by ensuring that only one level of citizenship existed throughout the land.

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105 *Id.* By passing the 1866 Act, Congress indicated that it considered discrimination in both the rights to purchase and the right to contract a "badge" or "incident". *Id.* at 441. In an early decision the Court refused to regard private denial of public accommodations as a "badge or incident of slavery" under the thirteenth amendment since it had nothing to do with slavery or involuntary servitude. Civil Rights Cases, 109 U.S. 3, 24 (1883). It viewed badges and incidents as those burdens and disabilities on fundamental rights, such as the right to contract and to purchase property, imposed by slavery. *Id.* at 22. Both employment discrimination and the housing discrimination prohibited in *Jones* fall within the earlier Court's definition.

106 392 U.S. at 413.

107 *See* Note, *Jones v. Mayer: The Thirteenth Amendment and the Federal Anti-Discrimination Laws*, 69 COLUM. L. REV. 1019, 1026-27 (1969); 20 CASE W. RES. L. REV. 448, 457-59 (1969).

108 The thirteenth amendment was one of a series of post-Civil War enactments aimed at terminating the last signs of slavery and ensuring freedom. It was preceded by the wartime Emancipation Proclamation and passed to insure that document's post-war validity. *See* 1 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 13 (B. Schwartz ed. 1970).

109 *See* J. TENBROEK, EQUAL UNDER LAW 157-73 (1965).

110 Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27.

111 *See* 42 U.S.C. § 1981 (1970); note 99 *supra*.

112 *See* J. TENBROEK, *supra* note 109, at 179; CONG. GLOBE, 39th Cong., 1st Sess. 438 (1866).

113 *See* United States v. Classic, 313 U.S. 299, 327 (1941); CONG. GLOBE, 39th Cong., 1st Sess. 599, 601 (1866).

Due to its language and its history, section 1981 has been applied to prohibit both racial[114] and non-racial[115] discrimination. If the intent of the framers was indeed to secure universal freedom and to establish equality, then "white citizens," must be interpreted broadly. This standard was selected at a time when, compared with other groups, whites did enjoy superior rights and was intended to indicate the highest form of personal liberty and freedom. The purpose and intent of the framers of the statutory provision, therefore, requires that the law not be limited to racial discrimination or to non-whites.[116]

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[114] Central Presbyterian Church v. Black Liberation Front, 303 F. Supp. 894 (E.D. Mo. 1969); Gannon v. Action, 303 F. Supp. 1240 (E.D. Mo. 1969), *modified on other grounds*, 450 F.2d 127 (8th Cir. 1971). The courts in *Central Presbyterian Church* and *Gannon* held, in effect, that when blacks invaded a white church, whites were denied the rights of "white citizens." *Contra* Perkings v. Banster, 190 F. Supp. 98, *aff'd*, 285 F.2d 426 (4th Cir. 1960) (section 1981 jurisdiction not available to white claiming false arrest). *See also* Dombrowski v. Dowling, 459 F.2d 190, 199 n.24 (7th Cir. 1972) (court suggests without deciding that section 1981 may not apply to white who was denied office rental because associates were blacks); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972) (section 1981 prohibits employment discrimination based on race, whether it is against blacks or whites; court however viewed section 1981 as based on fourteenth amendment); 23 VAND. L. REV. 413 (1970) (discussion of *Gannon*).

[115] *See* Scher v. Board of Educ., 424 F.2d 741, 743 (3d Cir. 1970) (per curiam) (sections 1981 and 1983 do not apply exclusively to racial or religious discrimination; available to boy denied equal protection by arbitrary expulsion from school). *Contra* Schetter v. Heim, 300 F. Supp. 1070, 1073 (E.D. Wisc. 1969). *But cf.* Georgia v. Rachel, 384 U.S. 780, 791-92 (1966) (legislative history of Civil Rights Act of 1866 shows intent restricted to racial equality).

The Court also has upheld anti-peonage statutes based on the thirteenth amendment regardless of the race of the defendant. *See* Clyatt v. United States, 197 U.S. 207, 218 (1905). Section 1981 was enacted to enforce the thirteenth amendment and applies to all races and colors. Buchanan v. Warley, 245 U.S. 60, 78 (1917). However, the Court in *Buchanan* appeared to place some weight on the reenactment of section 1981's predecessor, the Civil Rights Act of 1866, after the fourteenth amendment became effective. *Id.* at 74-76. Two other cases which hold that section 1981 applies to all races and colors appear to rely at least in part on the fourteenth amendment rationale. *See* Takahashi v. Fish Comm'n, 334 U.S. 410, 419 (1948) (section 1981 rests in part on the fourteenth amendment); United States v. Wong Kim Ark, 169 U.S. 649, 695-96 (1898) (acknowledges section 1981's thirteenth amendment basis but uses fourteenth amendment rationale). However, in a recent case involving denial of welfare benefits to resident aliens the Supreme Court indicated that section 1981 was separate from the fourteenth amendment. *See* Graham v. Richardson, 403 U.S. 365 (1971) (state statute violated fourteenth amendment as well as federal power to regulate aliens as carried out by section 1981). Moreover, the *Jones* Court stated that reenactment of the 1866 Act after the fourteenth amendment did not affect the scope of the Act. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 436 (1968).

[116] It has been suggested that limiting the protection of the Act to blacks offends the equal protection clause of the fourteenth amendment. *See*, Note, *The "New" Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294, 1315-16 (1969); 20 CASE W. RES. L. REV. 448, 459 n.75 (1969).

The *Jones* Court, while calling segregated housing patterns a "relic" of slavery,[117] applied the term to practices which could be traced only indirectly to the institution of slavery itself.[118] Thus the expression should not be used to limit a "badge or incident" to those employment practices which existed during the period of slavery. If by "relic" the Court meant the discrimination which the black man faces, not because of his former servitude, but because of his current second-class status in society,[119] then that same discrimination is suffered by the handicapped who are isolated and set apart from the mainstream of society.[120] It cannot be said that the handicapped are treated as first class citizens enjoying all of the rights of "white persons." The handicapped, therefore, should be protected by both the thirteenth amendment and section 1981.

Such a view of the amendment and its purpose is consistent with the intention of its framers to secure universal freedom.[121] Even if the framers comprehended no other discrimination than racial, the Constitution is not an inflexible document, frozen by the attitudes and conditions which prevailed at the time of its passage.[122] Rather, the Constitution is a living institution, adaptable to the circumstances of modern society and responsive to the ideal of true equality for all people. Since the courts must determine the significance of constitutional principles by considering their growth as well as their origin,[123] their interpretation of the Constitution can be responsive to the changing social and economic values of the nation.[124] The evil which the thirteenth

117 392 U.S. at 442-43.

118 The Court viewed racial ghettoes which are a development of the 20th century as a "relic" of slavery. *Id. But see* Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 S. CT. REV. 89 (description of housing segregation during Civil War).

119 While some of the discriminatory racial practices existing today may have been in existence at the time of slavery they appear to be based less on former servitude and more on unreasoning prejudice which causes some whites to view blacks as inferior. *See* 392 U.S. at 446 (Douglas, J., concurring).

120 *See* Lassen, *Voice of the Militant Cripple*, EVENT (Aug. 1969) (published by the President's Committee on Employment of the Handicapped). The isolation may stem in large part from discrimination by employers and school systems. *See* notes 12-16, 78-86 *supra* and accompanying text.

121 *See* note 103 *supra* and accompanying text.

122 *See* United States v. Classic, 313 U.S. 299, 316 (1941); Wright v. United States, 302 U.S. 583, 607 (1938). The Constitution is a starting point for developing legal reasoning rather than an aggregate of hard and fast precepts to be handed on and followed from generation to generation. *See* Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 23 (1936).

123 *See* Gompers v. United States, 233 U.S. 604, 610 (1914) (Holmes, J.).

124 *See* Note, *supra* note 116, at 1302-03. The lawmakers couched the amendment in terms general enough to encompass the total institution of slavery as it developed, responding fully to the evil perceived. *Id.* at 1302. As modern perception of that evil

amendment originally sought to eradicate was the inherent injustice of maintaining a class of people in a position of inferiority. An interpretation of the amendment which includes all persons who suffer from such inferiority, even if not the specific intent of the framers, would be within the spirit of their enactment.[125]

PUBLIC EMPLOYMENT

While federal agencies are prohibited by law from discriminating against an individual because of a physical handicap,[126] few states have similar statutes. Moreover, the courts have given scant attention to whether a state agency is prohibited from refusing to hire an otherwise qualified person purely on the basis of a physical handicap.[127] The Supreme Court consistently has recognized that the fourteenth amendment, while granting the states power to treat classes of people in different ways,[128] does deny them the power to discriminate on the basis of irrelevant criteria.[129] Thus the Court, although never acknowledging

grows, the response may assume an increasingly broader scope. *Id.* By rejecting an overly narrow interpretation of the amendment it may be more readily adapted to the "evils" of today's society. *Id.* at 1302-13.

[125] *See* Griffin v. Breckenridge, 403 U.S. 88, 97 (1971) (accords early civil rights statutes a sweep as broad as their language). However, *Griffin* indicated that the thirteenth amendment is closely related to slavery. *See id.* at 105. In another decision the Court dismissed an argument that a city's action to close its pools rather than to integrate them was a badge or incident of slavery. Palmer v. Thompson, 403 U.S. 217 (1971). The Court noted that although the enabling clause of the amendment might allow the passage of legislation to control pool closings, Congress had not chosen to pass such a statute. *Id.* at 227.

[126] *See* 5 U.S.C. § 7153 (1970). Only one action has been brought under this statute. *See* Kletzing v. Young, 210 F.2d 729 (D.C. Cir. 1954) (suit by blind man to be reinstated on Civil Service employment register; brought under section 7153's predecessor; dismissed as moot since register had expired).

The Vocational Rehabilitation Act of 1972 contained a section prohibiting discrimination in federally funded programs. *See* H.R. 8395, 92nd Cong., 2d Sess. § 604 (1972). The Act was vetoed by the President. Weekly Compilation of Presidential Documents, Oct. 30, 1972.

[127] *See* King-Smith v. Aaron, 455 F.2d 378 (3d Cir. 1972), *rev'g* 317 F. Supp. 164 (W.D. Pa. 1970). The Third Circuit, in reversing the abstention-dismissal by the district court, remanded the plaintiff's fourteenth amendment and section 1983 claims and asserted that these claims enjoyed jurisdiction which the federal court had a duty to consider. *Id.* at 381; *see* 42 U.S.C. § 1983 (1970).

[128] *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 446-47 (1970), *citing* Reed v. Reed, 404 U.S. 71, 75-76 (1971); Railway Express Agency v. New York, 336 U.S. 106 (1949); Barbier v. Connally, 113 U.S. 27 (1885).

[129] *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 446-55 (1972) (statute barring sale of contraceptives distinguished between married and unmarried individuals); Reed v. Reed, 404 U.S. 71, 75-76 (1971) (statute gave preference to men in granting letters of estate administration); Morey v. Doud, 354 U.S. 457, 465-66 (1957) (licensing statute exempted one corporation); Armstead v. Starkville Municipal Separate School Dist.,

the existence of a right to public employment,[130] has held that a person constitutionally is protected by the fourteenth amendment from arbitrary employment discrimination by the state.[131]

If a handicapped individual alleges facts which indicate arbitrary employment discrimination, action may be maintained under section 1983 of title 42 of the *United States Code*.[132] Since the action of an agency through its officials is state action within the meaning of the statute, the claim is cognizable.[133] The complainant of course must be prepared to prove that the denial of employment was due to discrimination and not to a lack of proper qualifications.

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325 F. Supp. 560, 569 (N.D. Miss. 1971), *modified*, 461 F.2d 276 (5th Cir. 1972) (racial discrimination in hiring and retaining public school teachers); *accord*, Chambers v. Hendersonville City Bd. of Educ., 364 F.2d 189, 192 (4th Cir. 1966) (en banc). *See also* note 23 *supra* and accompanying text.

[130] For many years government employment and government services have been regarded as privileges, not rights, and thus unprotected by rules of substantive due process. However, such distinctions have been so eroded that the concept remains of doubtful validity. *See generally* Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

[131] *See* Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967); Wieman v. Updegraff, 344 U.S. 183, 191-92 (1952). An individual is also constitutionally protected from employment discrimination by the federal government. *See* Colorado Anti-Discrimination Comm'n v. Continental Airlines, Inc., 372 U.S. 714, 721 (1963) (racially discriminatory federal hiring regulation would violate the fifth amendment); United Pub. Workers v. Mitchell, 330 U.S. 75, 100 (1947) (Congress could not enact regulation providing that no Republican, Jew or Negro could be appointed to federal office). *See also* Comment, *Aliens and the Civil Service: A Closed Door?*, 61 GEO. L.J. 207, 215-18 (1972) (federal discrimination and the fifth amendment).

Even if a handicapped individual has a valid claim, he faces, however, the general reluctance of the courts to oversee federal agencies' hiring practices. *See* Comment, *Racial Discrimination in the Federal Civil Service*, 38 GEO. WASH. L. REV. 265, 280 (1969); Comment, *Aliens and the Civil Service: A Closed Door?*, 61 GEO. L.J. 207, 216-17 (1972).

[132] 42 U.S.C. § 1983 (1970). Section 1983 requires two elements: the party must have been deprived of rights secured by the Constitution and laws of the United States; and the deprivation must have been under the color of state law. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).

Section 1983 was originally section one of the Civil Rights Act of 1871 which was enacted to enforce the provisions of the fourteenth amendment. Mitchum v. Foster, 407 U.S. 225, 238 (1972); *see* Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13, *as amended*, 42 U.S.C. § 1983 (1970). Section one was modeled on section two of the Civil Rights Act of 1866. 407 U.S. at 238; *see* Act of Apr. 9, 1866, ch. 31, § 2, 14 Stat. 27.

[133] The legislative debates surrounding passage of section 1983's predecessor indicate that the discriminatory state action may be executive, legislative or judicial. Mitchum v. Foster, 407 U.S. 225, 238 (1972); *Ex parte* Virginia, 100 U.S. 339, 346-47 (1879). Even an abuse of authority is covered by section 1983. See Monroe v. Pape, 365 U.S. 167, 172 (1961); United States v. Classic, 313 U.S. 325, 326 (1941).

However, the federal government and the District of Columbia are not states within the meaning of the statute. District of Columbia v. Carter, 409 U.S. 418, 419 (1973).

If an action is maintainable under either section 1983 or the fourteenth amendment alone,[134] the handicapped person may have recourse against a number of employers, depending upon their relationship with the state. Under a broad interpretation an action should be maintainable against all public agencies as well as private organizations significantly controlled by the state.[135] The handicapped individual must select the defendant carefully since municipalities may be immune from suit under section 1983.[136] However, recovery has been allowed against

[134] An action for denial of equal protection of the laws may be maintained under the fourteenth amendment alone. *See, e.g.*, Griffin v. County School Bd., 377 U.S. 218, 232-33 (1964); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Staub v. City of Baxley, 355 U.S. 313 (1958). One court has held that an action not cognizable under section 1983 against a county could be maintained against the same defendant under the fourteenth amendment. *See* Shelbourne Inc. v. New Castle County, 293 F. Supp. 237, 245-46 (D. Del. 1968). *Contra*, Whitner v. Davis, 410 F.2d 24 (9th Cir. 1969). The requirements for state action are the same under section 1983 and the fourteenth amendment. United States v. Price, 383 U.S. 787, 794 n.7 (1966).

[135] Discrimination in transportation systems has been successfully labelled state action. *See* Kissinger v. New York City Transit Authority, 274 F. Supp. 438 (S.D.N.Y. 1967); note 54 *supra* and accompanying text.

Actions of hospitals, too, have come under judicial scrutiny. *See* McCabe v. Nassau County Medical Center, 453 F.2d 698 (2d Cir. 1971). In *McCabe* the court held that since the hospital was a public institution, the plaintiff need not point to specific state statutes compelling them to act as they did in order to meet the "under color of state law" requirement of section 1983. *Id.* at 703-04. It is the source of the defendant's authority, not only the laws that purport to justify the action, which determine whether the defendant has acted under color of law. *Id.* at 704. Whether or not the state's role in regulating private hospitals would be sufficient to make their actions "state action" has been considered by several lower courts. The majority seem to have concluded that due to the states' role in disbursement of funds under the Hill-Burton Act private discrimination is state action. *See* Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963) (excellent discussion of Hill-Burton; racial discrimination); Holmes v. Silver Cross Hosp., 340 F. Supp. 125 (N.D. Ill. 1972) (violation of religious belief); Sams v. Ohio Valley General Hosp. Ass'n, 257 F. Supp. 369 (N.D.W. Va. 1966) (discrimination against out-of-state physicians); Hill-Burton Act § 622(f), 42 U.S.C. § 211(e)(f) (1970). *But see* Place v. Shepherd, 446 F.2d 1239 (6th Cir. 1971) (receipt of state or federal funds did not transform private hospitals into public institutions). The court in *Place* indicated, however, that there might be a cause of action if a public hospital refused to hire. *Id.* at 1246.

[136] *See* Monroe v. Pape, 365 U.S. 167, 191 n.50 (1961) (Chicago not "person" under statute). The decision has caused considerable confusion in the circuits, and some courts either have interpreted the Court's statements narrowly or have considered *Monroe* overruled *sub silentio* by later opinions which failed to consider whether the entity sued was proper under section 1983. Other courts have distinguished between actions for damages, such as *Monroe*, and those for equitable relief, or have ignored *Monroe* completely. *See* Johnson v. Cincinnati, 450 F.2d 796 (6th Cir. 1971) (ignored *Monroe*); Harkless v. Sweeney Independent School Dist., 427 F.2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971) (restricted *Monroe* to its facts and granted equitable relief under section 1983); Schnell v. City of Chicago, 407 F.2d 1084, 1086 (7th Cir. 1969) (*Monroe* limited to money damages); Local 858, Am. Fed'n of Teachers v. School Dist. No. 1, 314 F. Supp. 1069, 1073 (D. Colo. 1970) (*Monroe* rendered irrelevant by Supreme Court cases ignoring it); Note, *Civil Rights—School Officials Not Persons For Purposes*

entities such as school boards[137] and state universities.[138] Even if an immunity exists, the plaintiff may sue the state employee who deprived him of his rights in the employee's individual capacity.[139] Thus, the handicapped may have a potent means of redress for public employment discrimination.

CONCLUSION

Although concern for the plight of the handicapped may be increasing, they still face serious obstacles in their effort to achieve equal treatment by society. While many areas merit attention, education, physical access, and employment are among the most significant. Although there has been little litigation involving the rights of the disabled, possibilities for redress do exist. By carefully selecting strong cases in which the right denied is extremely important, and the discrimination and damage are evident, the handicapped may be able to achieve some success through the courts. However, the theories discussed herein are only suggestions for legal action; they are largely unexplored and do not preclude the development of other strategies.

It is nonetheless imperative for the handicapped to continue to focus efforts on Congress and the state legislatures. Legislation ensuring the rights of the handicapped would be the most uniform and far reaching solution to the problems presented. The inclusion of the handicapped among those protected by the Civil Rights Act of 1964[140] is the most desirable solution on the federal level. Such an amendment would allow the handicapped access to the Act's complaint mechanisms and to the

of Section 1983 Regardless of Relief Sought, 24 S.W.L.J. 360, 362-64 (1970) (discussion of cases in which the appropriateness of the entity sued was ignored).

Moreover, one court held that while a police department was not a person for purposes of section 1983, a suit for denial of equal protection could be maintained under section 1981. *See* United States *ex rel.* Washington v. Chester County Police Dep't, 294 F. Supp. 1157 (E.D. Pa. 1969), *aff'd on rehearing*, 300 F. Supp. 1279 (E.D. Pa. 1970). *See generally* Thornberry, *Suing Public Entities Under the Federal Civil Rights Act: Monroe v. Pape Reconsidered*, 43 U. COLO. L. REV. 105, 108-17 (1971); Note, *Developing Governmental Liability Under 42 U.S.C. § 1983*, 55 MINN. L. REV. 1201 (1971); 24 VAND. L. REV. 1252 (1971).

[137] *See, e.g.*, Walton v. Nashville Special School Dist., 401 F.2d 137 (8th Cir. 1968); Rolfe v. County Bd. of Educ., 391 F.2d 77 (6th Cir. 1968); Wall v. Stanley County Bd. of Educ., 378 F.2d 275 (4th Cir. 1967).

[138] *See* Brown v. Strickler, 422 F.2d 1000 (6th Cir. 1970) (no discussion of *Monroe*). *Contra*, Kirstun v. Rector, 309 F. Supp. 184 (E.D. Va. 1970) (relies on *Monroe*).

[139] *See* Monroe v. Pape, 365 U.S. 187, 192 (1961). Suits against the individual, however, may have a limited effect on the public agencies' policies and may produce little in the way of monetary recovery. *See* Note, *Developing Governmental Liability Under 42 U.S.C. § 1983*, 55 MINN. L. REV. 1201, 1209 (1971) (discussing recovery against policemen).

[140] 42 U.S.C. § 2000e (1970).

expertise of its enforcement offices. The enactment of legislation will not, however, be the end of the struggle. Rather, it will be the beginning of a process which eventually must ensure that every handicapped individual has an even start with the rest of society.